United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2147

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 75 - 2147

ARCHIE CHESNEY,

Petitioner-Appellee

vs.

CARL ROBINSON, Warden of Connecticut Correctional Institution, Somers

Respondent-Appellant

B
P/S

On Appeal From The United States

District Court For The District of Connecticut

*** BRIEF FOR PETITIONER-APPELLEE ***

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UNITED STATES COURT OF APPEALS

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No. 75-2147

ARCHIE CHESNEY,

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CARL ROBINSON, Warden
Connecticut Correctional Institution, Somers

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BRIEF FOR PETITIONER-APPELLEE

Statement of the Case

The Petitioner adopts the Statement of the Case set forth in the brief of the Respondent.

Statement of the Facts

On February 9, 1971, at about 11:30 a.m., James Lindsey and the decedent, Robert Lubas, drove to the Beardsley Terrace housing project in Bridgeport and entered Apt. 703. Lindsey, the prosecution's first witness, testified that Archie Chesney let the two into the apartment, (Tr.20)*

* All "Tr." references are to pages in the transcript of the state court criminal trial.

and then Chesney and Lubas went down the hall toward a bedroom while Lindsey went into the kitchen. Lindsey testified that he heard an argument and a popping noise, and then saw Lubas walking down the hall holding his chest. (Tr. 21). Lindsey then testified as follows:

Q: Approximately, how long after you heard this popping noise, how long was it before you saw Robert Lubas?

A: A matter of seconds.

Q: Where did you see him then?

A. He was walking down the hall towards the door.

Q: What, if anything, was he doing as he walked down the hall?

A: He was holding his chest.

Q: Did you have an opportunity to observe his face at all?

A: Yes, I did.

Q: How did his face appear to you?

A: Just like a little worried look on his face.

Q: How was he manipulating, was he able to walk all right?

A: Yes, he was like just leaning on the wall, you know, walking out.

THE COURT: Did you say leaning on the wall?

THE WITNESS: You know, like brushing against the wall.

THE COURT: Please keep your voice up. The jury must hear you.

Q: Did you have some conversation with Robert Lubas?

A: Yes, I did.

Q: Using the exact words that were spoken between you, Mr. Lindsey,

would you tell the ladies and gentlemen of the jury what was said at that time?

A: Well, he said, 'Let's get the fuck out of here,' and then I says to him, 'What happened'? He said, 'The bastard shot me.' I said, 'Who?' And he said, 'Archie.' (Tr. 30-31).

Lindsey then testified that he took Lubas to St. Vincent's Hospital where he told a police officer that Lubas had been shot while a group of them were standing around a street corner. He explained on the stand that he "lied" because he didn't think Lubas was "that badly hurt" and because "I didn't want to let him (the police officer) know anything about narcotics. (Tr. 33, 34). In his testimony, Lindsey had been uncertain how many people were actually in the apartment when the shooting occurred, (Tr. 33) and also gave inconsistent answers as to whether any other people went down the hall in addition to Chesney and Lubas. (R. 32).

Petitioner's defense counsel began his cross-examination by questioning Lindsey about an inconsistency between his testimony at trial and his earlier testimony before the Grand Jury:*

Q: Mr. Lindsey, you testified at the Grand Jury indictment; is that correct?

A: Yes, I did.

Q: When you testified at the Grand Jury indictment, you never mentioned the fact that Archie had shot him as a response to a question you asked, Mr. Lubas, did you? (Tr. 37).

At this point, the presecutor objected to the attempt to show the inconsistent testimony before the Grand Jury on the grounds that a failure to testify

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* The transcript of this entire sequence is set forth on pp. 4-7 of the Respondent-Appellant's brief.

could not be inconsistent with a later statement. Defense counsel rephrased the question once:

> Q: Did you tell the Grand Jury that Lubas said Archie shot me? This is something which again goes to the heart of the matter. (Tr. 40).

and again:

> Q: Did you tell the Grand Jury that your conversation with Lubas at the time in the apartment that Lubas said, "Archie shot me?"

Petitioner, who had been present during Lindsey's testimony before the Grand Jury, contended that at that time, Lindsey had not quoted the decedent as identifying Chesney as his assailant.

The trial court sustained the prosecutor's objections to these questions on the dual ground that a prior omission would not be inconsistent and that an attempt to question a witness concerning his prior testimony before a Grand Jury would violate the Connecticut rule of secrecy of Grand Jury proceedings.

During the continuation of cross-examination, Lindsey testified that he himself had been threatened with arrest in the case (Tr. 44) and that it was only after the police told him they were considering lodging charges against him, that he gave a second written statement, (Tr. 45) this time implicating Chesney. Lindsey was the only witness both to the shooting and to the subsequent incriminating statement. Two other witnesses testified that they were present in the apartment at the time of the shooting, and neither testified to having heard the conversation in which Lubas allegedly identified "Archie" as his assailant.

ARGUMENT

I.

THE PETITIONER-APPELLEE HAS EXHAUSTED HIS STATE REMEDIES, AND IS THEREFORE ENTITLED TO SEEK RELIEF BY WAY OF FEDERAL HABEAS CORPUS.

In the original return to this petition in the district court, the respondent stipulated that "petitioner has exhausted his state remedies pursuant to 28 U.S.C. §2254." In an amended return, however, the respondent changed his position and has claimed since then, both in the district court and on appeal, that the exhaustion requirement has not been met. Respondent was right the first time, as a review of the state court proceedings makes evident.

The main thrust of respondent's argument on this point is that neither the state trial court nor the Supreme Court of Connecticut ever decided the substantive cross-examination issue (set forth by petitioner in Part II of this brief) on constitutional grounds. Petitioner contends that while the state courts may not have decided the issue on constitutional grounds, the issue was clearly presented to them as a constitutional challenge. Accordingly, petitioner ought not have to bear the burden of denial of access to the federal courts as a result of inadequate state court treatment of important federal constitutional claims. As the district court noted in this case,

> The question, however, is not whether the State Supreme Court passed on the constitutional issue, but rather whether the 'substance' of

> the claim was properly presented to them. Picard v. Connor, 404 U.S. 270, 278 (1971). Petitioners cannot be deprived of their timely access to a federal court by the failure of a state court to decide a properly presented constitutional issue. Cf. Chambers v. Mississippi, 410 U.S. 284 (1973).

Chesney v. Robinson, ____F. Supp. ____(D.Conn., 1975).

A review of the record in the state court case, both at trial and on appeal, clearly demonstrates that the petitioner raised the "substance" of a constitutional challenge to the cross-examination issue. The trial court was well aware of the constitutional import of the petitioner's argument that Lindsey should be asked about his testimony before the grand jury, because in ruling on the objections outside the presence of the jury, the court stated:

> Now, if you can show me some Connecticut case or some United States Supreme Court decision which upholds your position, Mr. Galluzzo, I shall certainly consider it.

Transcript 41.

In his brief to the Supreme Court of Connecticut, the petitioner framed the issue as: "2. Did the court err in refusing cross-examination of a witness as to his testimony before the grand jury?" (Defendant's Brief at 4). His brief relied heavily upon Chambers v. Mississippi, 410 U.S. 284 (1973) and Williams v. Florida, 399 U.S. 78 (1970). After his conviction was affirmed on appeal, petitioner filed a Motion to Reargue, point III of which was: "Connecticut's Grand Jury procedure does not meet essential standards of fairness

and is therefore unconstitutional."[1] The Supreme Court of Connecticut again rejected this constitutional claim by denying the Motion to Reargue.

The petitioner then sought a writ of certiorari from the United States Supreme Court, raising therein the identical issue(s)[2] and supporting his argument with Chambers v. Mississippi. This petition was also denied.

Given this extended and consistent effort to secure review on constitutional grounds of the cross-examination issue which was at the

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1. In support of this claim, he maintained:

> For the State to deny transcription on the one hand, then deny cross-examination because there is no transcript, is to bootstrap procedure into injustice. If Lindsey should have told the Grand Jury about decedent's statement and did not, that is important evidence. To permit evidence to be lost to a defendant does not comport with modern standards of justice and fairness. Chambers v. Mississippi, 35 L.Ed. 2d 297 (1973).

Defendant's Motion to Reargue, at 4-5.

2. The first questions presented were:

> 1. Does Connecticut's Grand Jury procedure which precludes the taking of transcripts violate due process because it fails to preserve possible exculpatory material?
>
> 2. Does Connecticut's requirement of Grand Jury secrecy violate due process and the defendant's right to confront his accusers if it prohibits cross-examination of a witness as to a claimed difference between grand jury and petit jury testimony?

Petition for Writ of Certiorari at 2.

heart of petitioner's criminal conviction, respondent's suggestion that "Chesney should be required either to file a petition for state habeas corpus or a petition for a new trial" must be rejected outright. This is especially true in light of a recent decision of this court, Brathwaite v. Manson, Slip. Op. 235, (decided Nov. 20, 1975), wherein a district court's dismissal of a state prisoner's application for a writ of habeas corpus was reversed. This court declined to disturb the district court's finding that there has been exhaustion of state remedies in reasoning strikingly apposite to the case at bar:

> We believe, however, that the Connecticut Supreme Court's disposition of petitioner's claim, while less than a full consideration on the merits, would be considered by the Connecticut courts to be enough to bar a subsequent collateral proceeding since "Connecticut's rule [is] that [state] habeas corpus cannot serve as an appeal for questions which might have been raised for direct review," United States v. Menser, 247 F. Supp. 826, 829 (D.C. Conn., 1965); Wojculewicz v. Cummings, 143 Conn. 624, 628, 124 A.2d 886, 890-91 (1956). If this be so, the exhaustion requirement of 28 U.S.C. §2254 would pose no obstacle to petitioner since "§2254 is limited in its application to failure to exhaust state remedies still open to the habeas applicant at the time he files his application in federal court." Fay v. Noia, 372 U.S. 391, 435 (1963).

Slip Op. 235 at 599-600.

The rule that state habeas will not lie in Connecticut to resolve questions "which might have been raised for direct review" must surely be even more stringent in its foreclosure of habeas corpus relief when the question at issue has already been raised on direct review, as it has been in this case.

In conclusion, therefore, petitioner contends that the district court below correctly found that he "has fulfilled his duty to exhaust his state remedies" and the merits of his claim were properly before the federal court.

II.

THE PETITIONER-APPELLEE WAS DENIED HIS CONSTITUTIONAL RIGHT OF CONFRONTATION AND CROSS-EXAMINATION BY VIRTUE OF THE STATE TRIAL COURT'S REFUSAL TO PERMIT DEFENSE COUNSEL TO QUESTION A PROSECUTION WITNESS ABOUT HIS PIROR (INCONSISTENT) TESTIMONY BEFORE THE GRAND JURY.

Petitioner, a defendant in a murder trial, was denied the fundamental constitutional right to cross examine his accuser regarding the key inculpatory testimony in the case. The only evidence offered by the prosecution to prove that the decedent had identified the petitioner as his assailant came from James Lindsey. But when defense counsel tried to establish at trial that Lindsey had not given the same testimony before the Grand Jury, he was not permitted to do so. Counsel could not ask Lindsey the question critical to Chesney's defense--wasn't it true that Lindsey, in his prior recounting of the incident to the Grand Jury, had omitted any mention of the decedent identifying the petitioner as his assailant? The trial court completely foreclosed cross-examination on this issue when it sustained the state's objection on grounds of petitioner's failure to demonstrate a prior inconsistency and Grand Jury secrecy. The impact of this ruling cannot be over emphasized. In the words of the district court in this case:

> This ruling, as affirmed by the Connecticut Supreme Court, deprived the petitioner of his opportunity to fully present to the jury his theory that the Chief prosecution witness had fabricated a significant portion of his testimony, and, particularly, the damaging accusation by the decedent.

Chesney v. Robinson, ____ F. Supp. ____ (D.C.Conn., 1975).

"[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 405 (1965). Petitioner contends that the asserted interest of the state of Connecticut in the secrecy of the Grand Jury system cannot outweigh the importance of a defendant's right to cross-examine adverse witnesses. As the United States Supreme Court held in Chambers v. Mississippi, 410 U.S. 284, 296 (1973) state court adherence to its own common law rules of procedure and evidence "which bear little present relationship to the realities of the criminal process "cannot override the paramount Sixth Amendment right of confrontation.

In Davis v. Alaska, 415 U.S. 308 (1974) the defendant's right to cross-examine was held to outweigh the state's interest in maintaining the secrecy of juvenile court records and proceedings, although that interest had been consistently asserted and protected by state statute. The close attention to the competing interest purportedly sufficient to overcome the right of cross-examination required by Chambers, and the great weight to be afforded the right to confrontation and cross-examination articulated in Davis, require scrutiny "of the correctness of the [state] court's evaluation of the 'adequacy' of the scope of cross-examination," Davis v. Alaska, supra, at 315. This is particularly so for a witness whose testimony is "a crucial link in the proof . . . of petitioner's act." Douglas v. Alabama, 380 U.S. 415, 419, (1965). Cf. Dutton v. Evans, 400 U.S. 74 (1970).

The Supreme Court has held that denial of effective cross-examination "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it, Brookhart v. Janis, 384 U.S. 1, 3." Smith v. Illinois, 390 U.S. 129, 131 (1968), quoted with approval in Davis v. Alaska, supra, at 318. However, all indicia of importance underscore the vital nature of Lindsey's testimony in petitioner's trial. The jury asked that it be reread to them (Tr. 270-271) and the Supreme Court of Connecticut quoted it verbatim in its summary of the facts the jury could have found, 36 Conn. L.J. No. 4 at 21.

Clearly, Lindsey was the classic witness for whom searching cross-examination was all-important to assure "the mission of the Confrontation Clause," which is "to advance a practical concern for the accuracy of the truth-determining process in criminal trials." Dutton v. Evans, 400 U.S. 74, 89 (1970).

The second reason given by the trial court for its refusal to permit defense counsel to question Lindsey about his grand jury testimony--that previous silence could not constitute an inconsistent statement--was upheld by the Supreme Court of Connecticut in reasoning which can only be described as circular.[3] The court erected an insurmountable barrier in the path of

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3. The relevant part of the opinion states:

> The proceedings of a grand jury are informal and untranscribed. Moreover, they are conducted in secret. State v. Menillo, 159 Conn. 264, 274, 268 A.2d 667. Thus, the form and manner in which the inquest was conducted relative to this witness, whether the witness had been asked to relate all the relevant facts or whether he (continued on page 9).

the defendant's right to cross-examine. Because no transcript is kept of the Grand Jury proceedings under Connecticut practice, no record of either an affirmative inconsistent statement, or silence when a statement would naturally have been made, could exist. Because petitioner has no way to prove such a direct or indirect prior inconsistency, he may not inquire. Inquiry as to prior inconsistency is thus barred, since showing the inconsistency, held to be a prerequisite to cross-examination, can never be accomplished.

The United States Supreme Court condemned a similar logical box in Jencks v. United States,[4] emphasizing that "requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense." 353 U.S.

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3. Continued:

> has been asked which would have elicited the omitted facts, is unknown. It cannot be stated with any certainty that an omission in testimony before the Grand Jury constituted an inconsistency by which to impeach the witness' present testimony. See State v. Mosca, 90 Conn. 381, 391, 97 A.340. Under these circumstances, the secrecy of the Grand Jury proceedings could not be invaded. See State v. Coffee, 56 Conn. 399 410, 16 A. 151; State v. Fasset, 16 Conn. 457, 467.

36 Conn. L.J. No. 4, at 22.

4. While Jencks technically only established a rule for the federal courts, its language has taken on increased constitutional significance in light of the court's subsequent decisions in Pointer v. Texas, supra, (applying the confrontation clause to the states) and Brady v. Maryland, 373 U.S. 83 (1963)(finding due process violations in any failure by the prosecution to disclose exculpatory evidence). As the Supreme Court stated in Pointer, "the right of an accused to be confronted with the witness against him must be determined by the same standards whether the right is denied in a federal or state proceeding . . . ." 380 U.S. at 407-408.

657, 667 (1957). Rather than placing the burden on the defendant, the Constitution requires that the question be allowed.

If Lindsey were silent before the Grand Jury considering the shooting whose perpetrator Lubas allegedly named a few minutes after the fact, silence clearly requires explanation. As Dean Wigmore notes:

> A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. This is conceded as a general principle of evidence (Sec. 1071). There may be explanations . . . but the conduct is 'prima facie' an inconsistency. (Emphasis added).

3A Wigmore (Chadbourn Rev. 1970) §1042.

In describing the immediate circumstances of Lubas' shooting before the Grand Jury, it is simply inconceivable that Lindsey merely overlooked the most damning element of his testimony implicating Chesney. The possibility of a mere oversight before the Grand Jury becomes even more unlikely in the contest of Lindsey's prior inconsistent recountings of the shooting and his own fears and possible susceptibility to pressure as an early suspect himself. McCormick urges that just such elements compel placing the full context of alleged prior silence before the jury:

> [T]he test should be, could this jury reasonably find that a witness who believed the truth of the facts testified to would have been unlikely to make a prior statement of this tenor.

McCormick, Evidence (2d Ed.) Sec. 34 at 68.

Under Connecticut's unique Grand Jury System,[5] the defendant himself

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5. This system is described in detail in State v. Menillo, 159 Conn. 264, 274, 268 A.2d 667 (1970).

may be present, but may not record what transpires therein.[6] Pat Chesney was in the Grand Jury room, and could have impeached Lindsey's answer himself had that answer been allowed. Indeed, the trial court's refusal to permit the question prompted a remark from the petitioner who was upset at not having the trial jury hear Lindsey explain away either his earlier silence or a different story. As petitioner said, "Suppose to give the same testimony, don't they?," he was aware that the jury which held his life in its hands would not hear what he himself had heard in the Grand Jury room. The trial judge's refusal to allow the inquiry not only deprived Chesney of potentially devastating cross-examination--it also directly influenced his decision as to whether to testify in his own defense. He chose not to do so.

The Constitution requires that the defendant be "allowed to test the witness's recollection . . . or 'sift' his recollection so that the jury might judge for itself whether [the witness's] testimony was worthy of belief." Mattox v. United States, 156 U.S. 237, 242-43 (1895). Lindsay's alleged prior silence concerning Lubas's statement is the unexplained major gap in the state's case. Had the defendant been allowed to ask the question most basic to his defense as constitutionally mandated, and had the jury been able to judge for itself whether Lindsey's "testimony was worthy of belief," petitioner might be free today.

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6. State v. Delgado, 161 Conn. 536, 539-540 290 A.2d 338 (1971).

CONCLUSION

The petitioner-appellee, Archie Chesney, has exhausted his state remedies and is properly before the federal court, seeking relief for the deprivation, during a criminal prosecution, of his constitutional right of confrontation and cross-examination. For all of the foregoing reasons the judgment of the District Court should be affirmed and a writ of habeas corpus should issue forthwith.

Respectfully sumbitted,

THE PETITIONER-APPELLEE

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75-2147

UNITED STATES COURT OF APPEALS

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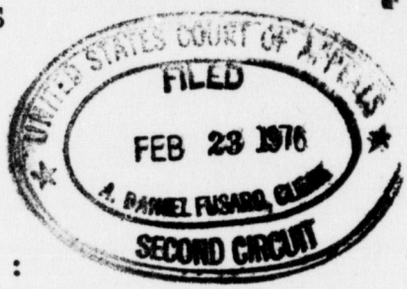

ARCHIE CHESNEY,
Petitioner - Appellee,

VS : Dkt. 75-2147

CARL ROBINSON, Warden, Connecticut Correctional Institution, Somers,
Respondent - Appellant : February 17, 1976

B

PETITION FOR REHEARING

In the above designated matter the respondent - appellant hereby respectfully moves for a rehearing in banc of the appeal. This court by decision dated February 6, 1976, affirmed the decision of the Federal District Court for the District of Connecticut on the Memorandum of Decision filed by Judge M. Joseph Blumenfeld.

POINT OF LAW FOR RECONSIDERATION

1. In a Connecticut constitutional grand jury, where there has traditionally been no transcript kept of the proceedings, can the defendant be permitted to cross-examine a witness on his testimony before that body?

ARGUMENT

To permit the cross-examination countenanced in the case sub judice is in effect to create a right without a remedy. Absent a transcript there are only two possible methods to impeach the witness. One would be for Chesney himself to take the witness stand. However assuming that Chesney has a previous felony conviction and that he also told inconsistencies to the police upon his arrest his testimony that Lindsey lied would be virtually meaningless. Also to require him to take this path might well conflict with his rights against self-incrimination. The second method would be to call all eighteen members of the grand jury and to inquire of their recollection. In the five year interval

since they were convened memories dim and fade. Thus without a transcript we have no means by which to measure any inconsistency. What will occur now when Chesney on retrial claims he has been deprived of a fair trial since the grand jurors' recollections are imperfect.

The opinion of the district court was based on Chambers v. Mississippi, 410 U.S. 284, and Davis v. Alaska, 415 U.S. 308. In each of those cases the proof of inconsistency was readily available. The prior statements of McDonald as well as the juvenile record of Green were probably physically on counsel's table waiting to be used. Such was obviously not the situation with Lindsey's grand jury testimony. Once it becomes necessary to go far afield for the evidence it loses its value. In Chambers and Davis the proof was right there. It did not require any elaborate procedure such as putting eighteen grand jurors on the witness stand.

If the affirmance of the federal district court's opinion engrafts the requirement of stenographic transcripts onto grand jury procedure it is at variance with opinions of this Court. Cobbs v. Warden, Docket No. 75-2089 decided on December 17, 1975, and United States v. Cramer, 447 F.2d 210, 213 (2 Cir. 1971), cert. denied, 404 U.S. 1024 (1972).

For these reasons the appellant - respondent submits that the instant decision goes beyond the present line of Supreme Court cases and enlarges the area of constitutional rights afforded by the sixth amendment. Therefore the appellant - respondent requests that the matter be reheard and suggests also that it might be an appropriate case for review by the Court in banc.

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This is to certify that a copy of the foregoing has been mailed to Judith M. Mears, Esq. and Stephen Wizner, Esq., 127 Wall Street, New Haven, Connecticut 06520

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